Public Prosecutor v Firman bin Fani

HIGH COURT (KOTA KINABALU) — NO K45–04 OF 2010-I
DAVID WONG J
13 SEPTEMBER 2011

Criminal Law — Murder — Whether death caused by accused — Accused seen stabbing deceased with shiny object — Eye-witness testimony consistent with pathologist's evidence of cause of death — Whether eye-witness credible and reliable — Whether failure to recover murder weapon fatal to prosecution's case — Whether intention to cause serious injury inferable from injuries and circumstances in which they were inflicted — Whether injuries sufficient to cause death

The accused was charged together with another person still at large (named 'Joy') with committing murder. A post-mortem on the deceased revealed he had died of massive bleeding and collapse of the lung due to stab wounds on the neck and chest caused by a sharp instrument, most likely a knife. The murder weapon was not recovered. Two prosecution witnesses, ('PW17') and ('PW18'), were with the accused and the deceased on the night of the incident. The prosecution relied on the eye-witness account of PW18 who testified that the accused had stabbed the deceased with a shiny object. The defence, inter alia, submitted it was unsafe to rely on PW18's evidence as he was drunk and panicky at the time and the area where the incident took place was dark. The accused said it was not him, but Joy, who stabbed the deceased. He further said he had no quarrel with the deceased and ran away from the crime scene because he panicked and did not want to be arrested by police. The prosecution said the defence's story was a mere denial, that there was no reason for the accused to have fled the crime scene if he had not done anything wrong and that PW18's testimony was reliable and he had no motive to blame the accused for the crime.

Held, convicting the accused of murder and sentencing him to death:

(1) PW18 was a credible witness. His eye-witness account was consistent with the expert evidence of the pathologist who testified that based on the appearance of the stab wounds, the likely weapon was a single cutting edge sharp tool (see para 18).

(2) Although PW18 had consumed alcohol that night, he was able to explain where and when he had consumed the drink; he was able to recollect with clarity that after the incident he called PW17 to return to the crime scene and attended to the deceased, which recollection was confirmed by

PW17. He then went to PW7's house to inform PW6 about the incident. Again this was confirmed by PW6 (see para 13).

(3) The issue of the unrecovered murder weapon was not fatal to the prosecution's case because PW18's eye-witness account was reliable and consistent with the injuries sustained by the deceased as testified by the pathologist (see para 19).

(4) Intention was inferable. The injuries inflicted on the deceased and the circumstances in which they were inflicted showed the accused intended to cause the injuries which were sufficient in the ordinary course of nature to cause death (see para 21).

(5) The prosecution had proved beyond reasonable doubt the charge of murder against the accused (see para 30).

[Bahasa Malaysia summary

Tertuduh didakwa bersama-sama dengan seorang lagi yang masih bebas ('Joy') dengan melakukan pembunuhan. Satu bedah siasat ke atas si mati mendedahkan bahawa dia meninggal dunia akibat pendarahan yang banyak dan kegagalan paru-paru akibat kesan tikaman di leher dan dada yang disebabkan oleh peralatan yang tajam, besar berkemungkinan pisau. Senjata pembunuhan tidak diperolehi. Dua saksi pendakwaan,('PW17') dan ('PW18'), bersama-sama dengan tertuduh dan si mati pada malam kejadian. Pihak pendakwaan bergantung pada saksi mata PW18 yang memberi keterangan bahawa tertuduh telah menikam si mati dengan objek yang berkilat. Pendakwaan, antara lain, menghujahkan adalah tidak selamat untuk bergantung kepada keterangan PW18 kerana dia mabuk dan panik pada masa dan kawasan di mana kejadian berlaku adalah gelap. Tertuduh mendakwa bahawa bukan dia, sebaliknya Joy, yang menikam si mati. Dia seterusnya mendakwa lagi dia tidak bertengkar dengan si mati dan telah melarikan diri dari tempat kejadian kerana dia panik dan tidak mahu ditangkap oleh polis. Pendakwaan menghujahkan bahawa kes pembelaan adalah satu penafian semata-mata, bahawa tiada sebab untuk tertuduh melarikan diri dari tempat kejadian itu jika dia tidak melakukan sebarang kesalahan dan bahawa keterangan PW18 boleh dipercayai dan dia tiada motif untuk menyalahkan tertuduh bagi jenayah tesebut.

Diputuskan, menyabitkan tertuduh dengan pembunuhan dan menjatuhkan hukuman mati:

(1) PW18 adalah saksi yang boleh dipercayai. Keterengan saksi mata adalah konsisten dengan keterangan pakar pakar patologi yang memberi keterangan bahawa berdasarkan bentuk kesan tikaman, senjata yang mungkin satu peralatan yang tajam (lihat perenggan 18).

(2) Walaupun PW18 telah mengambil alkohol pada malam tersebut, dia

mampu menjelaskan di mana dan bila dia telah mengambil minuman tersebut, dia dapat mengingati dengan jelas bahawa selepas kejadian itu, dia menghubungi PW17 untuk kembali ke tempat kejadian dan mendapatkan si mati, yang ingatannya disahkan oleh PW17. Beliau kemudian pergi ke rumah PW7 untuk memaklumkan PW6 tentang kejadian tersebut. Sekali lagi ini telah disahkan oleh PW6 (lihat perenggan 13).

(3) Isu senjata pembunuhan yang tidak diperolehi tidak *fatal* kepada kes pendakwaan kerana keterengan saksi PW18 boleh dipercayai dan konsisten dengan kecederaan yang dialami oleh si mati seperti keterangan yang diberikan oleh pakar patologi (lihat perenggan 19).

(4) Niat boleh disimpulkan. Kecederaan pada si mati dan keadaan di mana kecederaan-kecederaan dikenakan menunjukkan tertuduh bertujuan untuk menyebabkan kecederaan yang secara semulajadinya mencukupi menyebabkan kematian (lihat perenggan 21).

(5) Pihak pendakwaan telah membuktikan tanpa sebarang keraguan yang munasabah pertuduhan pembunuhan terhadap tertuduh (lihat perenggan 30).]

Notes

For cases on murder, see 4 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 1338–1393.

Cases referred to

Brabakaran v PP [1966] 1 MLJ 64; [1965] 1 LNS 12, FC (refd)
Kumaran Sappani v PP [2011] 3 CLJ 251, FC (refd)
Mahadzir bin Yusof v Anor v PP [2011] 1 MLJ 297; [2010] 1 LNS 1258, CA (refd)
Pendakwa Raya v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393, FC (refd)
PP v Chung Chung Kiang & 5 Others [2008] 1 LNS 400, HC (refd)
PP v Datuk Hj Harun Hj Idris (No 2) [1977] 1 MLJ 15; [1976] 1 LNS 97, HC (refd)
PP v Krishna Rao Gurumurthi & Ors [2000] 1 MLJ 274; [2000] 1 CLJ 446, HC (refd)
PP v Ling Tee Huah [1982] 2 MLJ 324; [1980] 1 LNS 212, ACRJ (refd)
PP v Saimin [1971] 2 MLJ 16 (refd)
Sabarudin bin Non & Ors v PP [2005] 4 MLJ 37, CA (refd)

Legislation referred to

Criminal Procedure Code ss 182A, 182A(2), 277
Penal Code ss 300(a), 302

Raja Zaizul Faridah bt Raja Zaharidin (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.

Hamid Ismail (Hamid & Co) for the accused.

David Wong J:

INTRODUCTION

[1] The accused is charged with the murder of Benny Binsos together with another who is known as Joy and still at large on 1 May 2008 at about 10pm near the river at Kampung Sugud, in the district of Penampang, Sabah.

THE LAW

[2] In order to establish a prima facie case of murder, the prosecution, at the end of its case must prove the following:

(a) that Benny Binsos (deceased) is dead;

(b) that the deceased died as a result of injuries sustained by him;

(c) that the injuries of deceased were caused by or the result of the acts of the accused; and

(d) that in inflicting those injuries upon the deceased, the accused either:

(i) caused them with the intention of causing death on deceased; or

(ii) caused them with the intention of causing such bodily injuries on deceased as the accused knew to be likely to cause death; or

(iii) caused them with the intention of causing bodily injuries on deceased and such bodily injuries intended to be inflicted were sufficient in the ordinary course of nature to cause death; or

(iv) committed the acts that are imminently dangerous that they must in all probability cause death or such bodily injuries as are likely to cause death.

END OF PROSECUTION'S CASE

[3] I am duty bound to apply a 'maximum evaluation of the prosecution's evidence' to determine whether a prima facie case has been made out. In the case of *Public Prosecutor v Chung Chung Kiang & 5 Others* [2008] 1 LNS 400, I had the opportunity to discuss what applying the 'maximum evaluation' approach actually involves and I came to the conclusion that it in fact involves applying the 'beyond reasonable doubt' test. My reasons in short are these. The Federal Court in *Pendakwa Raya v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393) had held that at the end of prosecution's case, the court must ensure that the evidence after maximum evaluation is at such a level that if the accused

remains silent the court must be willing to convict before defense is called. In another word the court must notionally presume that the accused had remained silent and as such also notionally treat the trial had ended. By virtue of that approach the court also cannot review the evidence if the accused chose to remain silent as was done by the courts prior to the maximum evaluation approach. The law is clear as to what the standard of proof is when the trial has ended and that is for the court to convict, the prosecution must have proved its case beyond reasonable doubt. This is what s 182A of the Criminal Procedure Code says:

> 182A Procedure at the conclusion of the trial.
>
> (1) At the conclusion of the trial, the Court shall consider all the evidence adduced before it and shall decide whether the prosecution has proved its case beyond reasonable doubt.
>
> (2) If the Court finds that the prosecution has proved its case beyond reasonable doubt, the Court shall find the accused guilty and he may be convicted on it.
>
> (3) If the Court finds that the prosecution has not proved its case beyond reasonable doubt, the Court shall record an order of acquittal.

[4] With that, I embarked on a maximum evaluation (as I understand it) of the evidence adduced by the prosecution to determine whether a prima facie case had been established.

DEATH OF THE DECEASED

[5] A post mortem was conducted on the deceased body by Dr Jessie Hiu (PW12) the pathologist on 2 May 2008. The deceased had been identified by his brother in law Chrispin S Mojingol at the mortuary where a post mortem was conducted on the deceased body. Photographs taken at the post mortem and at the crime scene were also shown to the witnesses (PW17 and PW18) who were with the accused and the deceased at the night of the incident and had confirmed in court that the deceased was Benny Binsos. In the circumstances, I find that this ingredient had been proven by the prosecution.

THE DEATH OF THE DECEASED WAS CAUSED BY THE INJURIES INFLICTED ON THE DECEASED

[6] Dr Jessie Hiu (PW12) the pathologist had testified that the death of the deceased was caused by stab wounds on the neck and chest. The pathologist's relevant testimony is as follows:

> Q: From these stab wounds, *which one caused the death of the deceased?*

A: Injury no. 5 – stab wound on the right front of the chest which injured right lung and injury no. 9 – stab wound on lower back of the neck and right shoulder which injured the right jugular vein.

Q: From your expert opinion what was the deceased cause of death?

A: Stab wound on the neck and the chest as stated on page 5 of my post mortem report.

Q: What made you come to the conclusion to that cause of death?

A: Both injury no. 5 and no. 9 cause massive bleeding and lead to severe lost of blood hypobolaemic shock. Apart from the bleeding the injury on the lung cause collapse of the lung and difficulty in breathing.

Q: Were the injuries found on the deceased sufficient in ordinary course of nature to cause death?

A: Yes.

Q: Was stab wound found on the deceased body fatal in nature?

A: Yes

Q: What was the chance of survival?

A: Very slim.

[7] Hence, I have no difficulty in finding that the deceased died due to the injuries sustained by him.

THE DEATH OF THE DECEASED WAS CAUSED BY THE INJURIES INFLICTED BY THE ACCUSED

The prosecution's contention

[8] The prosecution relied on the eye witness account given by PW18 who testified that the accused had stabbed the deceased with a shiny object although the murder weapon could not be identified by PW18.

The defence contention

[9] Counsel for the accused on the other hand, at the end of the prosecution's case, submitted that the accounts given by PW18 were unreliable and the reasons are these:

(a) PW18 did not see the accused possessing a shiny weapon while they were at PW7's house;

(b) PW18's account that he saw the accused had a shiny object in his hand was based on PW17's information to him;

(c) PW17 did not testify in court that he told PW18 about the weapon that the accused had, hence PW18's evidence was not corroborated by PW17's evidence;

(d) PW18 was under the influence of alcohol;

(e) the knife (exh P2) that was seized from the accused by PW2 had nothing to do with this case;

(f) the crime scene was dark at the material time, hence rendered PW18's evidence 'illogical';

(g) PW18's evidence in court was inconsistent with his statements to the police;

(h) PW18's evidence in court about the incident was inconsistent with police report attached to exh P44 and also PW19; and

(i) PW18's evidence in court was inconsistent with what he had told PW6, PW7 and PW17 immediately after the incident. PW18 did not mention that Joy was involved in the fight.

[10] Counsel for the accused further submitted that all the contradictions and inconsistencies mentioned above occurred because PW18 was very drunk, panicky, surprised and the surrounding area was very dark. Hence, it was submitted that it is unsafe to rely on his evidence. Counsel has referred the court to the case of *Sabarudin bin Non & Ors v Public Prosecutor* [2005] 4 MLJ 45, where it was held that:

> Whether the evidence of the approver in any given cases may be accepted or not will have to be determined by applying the usual tests such as the probability of the truth of what has deposed to, the circumstances in which he has come to give evidence, whether he has made a full and complete disclosure, …

THE COURT'S FINDING

[11] In order for the court to rely on PW18's accounts, I firstly determined the credibility of PW18's testimony and in doing this I had taken into consideration of what had been submitted by counsel for the accused and found that what had been contended had been fully answered by PW18. I will now set out in details of my consideration.

PW18's drunkenness

[12] In relation to such contention, I refer to a Federal Court's decision in the case of *Kumaran Sappani v Public Prosecutor* [2011] 3 CLJ 251 where it affirmed the Court of Appeal's decision which states as follows:

In relation to the allegation that the consumption of alcoholic drinks by SP12 has an effect on the evidence, the COA has affirmed the finding of fact as follows:

Setelah menimbangkan keterangan SP12 itu dan menilainya dengan keterangan-keterangan lain dalam kes ini, hakim bicara telah membuat kesimpulan fakta bahawa pada masa yang material SP12 tidak terlalu mabuk sehingga tidak sedar atau tidak mengetahui apa yang berlaku di sekitarnya, kerana dia adalah seorang peminum minuman keras yang berpengalaman yang telah minum minuman keras sejak dari tahun 1970an lagi. Selanjutnya, hakim bicara telah menimbangkan keterangan SP12 tentang apa yang berlaku sebelum, pada masa dan selepas kejadian pada malam tersebut dan membuat kesimpulan fakta bahawa walaupun SP12 mabuk pada masa yang material, dia masih boleh mengawal dirinya dan sedar serta tahu apa yang berlaku di sekelilingnya. Hakim bicara memutuskan bahawa SP12 adalah saksi yang bercakap benar.

Both the courts below have placed reliance on the decision of this court in *Francis Antonysamy v Public Prosecutor* [2005] 2 CLJ 481, *Public Prosecutor v Awang Raduan Awang Bol* [2005] 1 CLJ 649 and *Kenneth Fook Mun Lee v Public Prosecutor* [2006] 4 CLJ 359. The general principle extracted is that in any event from the evidence of experts, the blood alcohol level itself can never be conclusive to determine the degree of intoxication of the accused for different people react differently to the same blood alcohol level. In this appeal despite the urgings of counsel for the appellant, the COA applied the approach in *Kenneth Fook Mun Lee v Public Prosecutor*, wherein this court approved the finding of the COA in the same case as follows:

We are of the view that even if the respondent was intoxicated as found by the learned judge, on the evidence he was not in a high advanced stage of drunkenness as not to know what he was doing …

[13] PW18 did not deny that he had consumed alcoholic on that night but as submitted by the prosecution, he was able to explain where and when he consumed such drink. He was also able to recollect with clarity that after the incident, he called PW17 to return to the crime scene and had attended to the deceased, which recollection was confirmed by PW17. He then went to PW7's house to inform PW6 (Jimmy) about the incident who then testified that he went to the scene and called the police. Again this was confirmed by PW6. His affirmation on his state of mind can be seen in his testimony:

Q: katakanlah Oliver mabuk. Memandangkan kau minum lagi awal dari Oliver maka tahap mabuk kau lagi tinggi dari Oliver sebab kau minum lebih awal?

A: setahu saya kalau minum tidak semestinya kalau minum banyak dia mesti mabuk sebab ada orang minum banyak pun tapi dia tahan. Oliver tidak boleh lawan saya minum.

Dark night

[14] PW18 did not deny that the area of the crime scene was dark as contended by the accused. This is what he said:

Q: bagaimana keadaan sekeliling masa itu?

A: Gelap la tapi ada rumah dekat-dekat dan ada sedikit cahaya dari rumah itu.

[15] Further he was very familiar with that place as was confirmed by PW17 that the crime scene was across from John's (PW7) house:

Q: tempat kejadian di mana?

A: seberang rumah John.

[16] Hence I find that the fact that the place of incident occurred at night does not detract PW18's evidence.

Inconsistent evidence between PW17 and PW18

[17] Counsel for the accused had submitted that since PW17 did not testify in court about the information that he had given to PW18 regarding the knife that the accused had, PW18's evidence was uncorroborated. This inconsistency in my view cannot be held against the prosecution as no two persons can describe the same thing in the same manner. As pointed out by Raja Azlan Shah FJ (as His Majesty then was) said in *Public Prosecutor v Datuk Hj Harun Hj Idris (No 2)* [1977] 1 MLJ 15; [1976] 1 LNS 97 at p 19:

> In my opinion discrepancies there will always be, because in the circumstances in which the events happened, every witness does not remember the same thing and he does not remember accurately every single thing that happened. It may be open to criticism, or it might be better if they took down a notebook and wrote down every single thing that happened and every single thing that was said. But they did not know that they are going to be witnesses at this trial. I shall be almost inclined to think that if there are no discrepancies, it might be suggested that they have concocted their accounts of what had happened or what had been said because their versions are too consistent. The question is whether the existence of certain discrepancies is sufficient to destroy their credibility. There is no rule of law that the testimony of a witness must either be believed in its entirety or not at all. A court is fully competent, for good and cogent reasons, to accept one part of the testimony of a witness and to reject the other. It is therefore, necessary to scrutinise each evidence very carefully as this involves the question of weight to be given to certain evidence in particular circumstances.

[18] Hence, I am of the opinion that PW18 is a credible witness. Furthermore, I agree with the prosecution's submission that the eye witness accounts given by PW18 was consistent with the expert evidence given by the pathologist PW12 who testified that based on the appearance of the stab wounds, the likely weapon was a single cutting edge sharp weapon. In the case of *Brabakaran v Public Prosecutor* [1966] 1 MLJ 64; [1965] 1 LNS 12, Ong Hock Thye FJ, held that:

> Corroborative evidence is not necessarily restricted to the oral evidence of an independent witness. Corroboration can equally well be afforded by established facts and the logic of established facts sometimes speaks more eloquently than words.

[19] In relation to the issue of the unrecovered murder weapon, I am of the view that it is not fatal to the prosecution's case. This is because I have concluded that that the eye witness accounts given by PW18 were reliable and they are consistent with the injuries sustained by the deceased as testified by the pathologist (PW12). In the case of *Mahadzir bin Yusof v Anor v PP* [2011] 1 MLJ 297; [2010] 1 LNS 1258, in relation to the issue of non-recovery of the murder weapon, the court held that:

> The evidences clearly showed the cause of death was due to a blunt object possibly the wooden baseball bat which was never recovered. However, this does not mean that without the murder weapon an otherwise solid case will result in acquittal. This would mean that all criminals will get away scot free due to the non production of the murder weapon.

[20] Hence, based on the reasons given above, I find that it was the accused who had caused the injuries which resulted in the death of the deceased.

Intention to cause him bodily injury which was sufficient in the ordinary course of nature to cause death

[21] The intention of the accused can be inferred from the injuries inflicted on the deceased and the circumstances in which the injuries were inflicted. In my view and I think conceded by counsel for the accused, the injuries inflicted are injuries are sufficient in the ordinary course of nature to cause death. What is disputed is that the accused had no intention to cause those injuries. My view on the nature of injuries is of course is confirmed by the testimony of the pathologist (PW12) that stab wound on the right front of the chest which injured right lung and another stab wound on the lower back of the neck and right shoulder which injured the right jugular vein were injuries which cause in the ordinary course will cause death. It is the DPP's contention that the fact that the deceased had those injuries showed that the intention of the accused was to cause injuries which in the natural course would cause death. In the case of *Public Prosecutor v Krishna Rao Gurumurthi & Ors* [2000] 1 MLJ 274; [2000] 1 CLJ 446 where it was held:

> I am satisfied at this stage of the proceeding that the multiple three wounds inflicted on the respective victim by a sharp object as found by the forensic pathologist in respect of each charge could only lead to one and only one conclusion — that the six person who caused them had intended to commit murder. This satisfies the plenary requirement of mens rea of the offence under s 300(a) of the Penal Code. In such a

A situation intention is a matter of inference as was said by Raja Azlan FJ in former Federal Court case of *Tham Kai Yau & Ors v Public Prosecutor* [1976] 1 LNS 159:

> It cannot be disputed that intention is a matter of inference. The deliberate use by some men of dangerous weapons at another leads to the irresistible inference that their intention is to cause death. This inference should therefore make it a simple matter to come to a decision as to intention, in any case, such as the present, where the weapons used by the appellants were deadly weapons and where the person killed was struck more than one blow.

[22] Hence, from the injuries inflicted on the deceased and the circumstances that the injuries were inflicted, I concluded that the accused had the intention to cause injuries to the deceased and such injuries are sufficient in the ordinary course of nature to cause death.

Issue on common intention

[23] Counsel submitted that by amending the charge after the testimony of PW17, an adverse inference must be invoked against the prosecution for its conduct in amending the charge. As I have accepted the evidence of PW18, this contention is without merit.

END OF THE DEFENCE CASE

[24] Based on the grounds as stated above, on 24 June 2011, I had ordered that the accused to enter his defence. The only witness to the defence case is the accused.

THE DEFENCE CONTENTION

[25] The accused evidence can be summed up as follows:

(a) the accused did not stab the deceased and it was Joy who killed the deceased. The accused had attended to the deceased who was then alive but was threatened by Joy to run away with him for fear of arrest by the police which he did as he was in a state of panic; and

(b) the accused's testimony was consistent with the evidence given by PW8 and PW17 in that the accused did not quarrel with the deceased when they were drinking together before the incident. Also, the accused did not know Joy and there is no evidence that both the accused and Joy had discussed to harm the deceased.

THE PROSECUTION'S CONTENTION

[26] The prosecution, on the other hand at the end of the defence's case,

submitted that PW18's eye witness account was reliable and it had not been affected by 15th the accused evidence. The prosecution's submission can be summed up as follows:

(a) the prosecution submitted that the evidence given by the accused was a mere denial. PW18 had given his eye witness accounts on how the incident happened. PW18 had no motive to accuse the accused because there was no evidence to show that PW18 had argued with the accused prior to the incident;

(b) there was no reason for the accused to have fled the crime scene if he had not stabbed the deceased. He entered Sabah with a valid document. Hence, the prosecution contention is that the fact that he had fled the scene gave a strong inference that he had done something wrong; and

(c) although the murder weapon could not be identified by the prosecution's witness, PW18 did not deny that he could not see the weapon used, but merely saw a shiny object being swung by the accused to the deceased. It was consistent with the testimony given by PW12 that the stab wounds were possibly caused by a single cutting edge sharp weapon.

THE LAW AT THE END OF DEFENCE CASE

[27] At this juncture, I am obliged in law to again apply the 'maximum evaluation test' on all the evidence available, prosecution and defence, to determine whether or not the prosecution had proved its case beyond reasonable doubt (s 182A of the Criminal Procedure Code (ibid)). In order to evaluate all the evidence, the prosecution and the defence, I am obliged to determine whether the total evidence before the court has raised a reasonable doubt on the accused's guilt. The meaning of 'reasonable doubt' is defined in the case of *Public Prosecutor v Saimin* [1971] 2 MLJ 16 where it was held:

> It is not mere possible doubt, because everything relating to human affairs and depending upon moral evidence is open to some possible or imaginary doubt. It is that state of the case which after the entire comparison and consideration of all the evidence leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.
>
> It has again been said that 'reasonable doubt' is the doubt which makes you hesitate as to the correctness of the conclusion which you reach. If under your oaths and upon your consciences, after you have fully investigated the evidence and compared it in all its parts, you say to yourself I doubt if he is guilty, then it is a reasonable doubt. It is a doubt which settles in your judgment and finds a resting place there. Or as sometimes said, it must be a doubt so solemn and substantial as to produce in the minds of the jurors some uncertainty as to the verdict to be given. A reasonable doubt must be a doubt arising from the evidence or want of evidence and cannot be an imaginary doubt or conjecture unrelated to evidence.

A COURT'S FINDING

[28] It is trite law that a mere denial without any other proof to reasonably dislodge the prosecution's evidence is not sufficient (see *Public Prosecutor v Ling Tee Huah* [1982] 2 MLJ 324; [1980] 1 LNS 212).

B

[29] The court had earlier decided that PW18 was a credible witness and for that reason I had called the accused to enter his defense. After evaluating the evidence by the accused and the prosecution together, I am of the opinion that they had not raised a reasonable doubt as to his guilt. My reasons are as follows:

C

(a) Accused testimony itself is inconsistent and contradictory.
The accused testified that when he attended to the deceased before fleeing the scene with Joy, the deceased was still alive. However, he also said that he was informed by Joy that he (Joy) had stabbed the deceased. In my view this evidence is contradictory. If he had attended to the deceased, he need not be informed by Joy that he had stabbed the deceased as he would have known personally who had stab the deceased. He had also testified that when he saw the deceased lying on the ground, he thought the deceased was drunk and at that particular time he was told by Joy to run which he did. The relevant part of the evidence is this:

D

E

Q: Bila kau nampak Benny terbaring, apa lagi kau nampak?

A: saya tanya Benny sebab saya ingat Benny jatuh mabuk tapi Joy ada sana dan macam mahu pukul Benny lagi. Terus saya pegang Benny dan cakap Joy cukuplah sebab ini mungkin sebab mabuk

F

Q: Masa kau pegang Benny, macam mana keadaan dia?

A: Dia masih hidup masa itu. Masa itu Joy cakap 'Kilat kalau kau tidak ikut lari kalau polis sampai kau akan kena tangkap juga'. Jadi saya panic dan lepaskan Benny. Saya tanya Joy apa yang kau sudah buat sama Benny, Joy cakap 'saya sudah tikam Benny'.

G

He could not have attended to the deceased as he had fled at the instigation of Joy.

H

(b) The accused evidence had supported the prosecution's contention.
It is the submission of counsel for the accused that the surrounding area of the crime scene was very dark. However, when the accused was asked about the surrounding area, he testified that:

I

Q: gelap boleh nampak atau tidak boleh nampak?

A: kalau dekat boleh nampak tapi kalau jauh tidak jelas.

Q: (from the witness box to the back of the bar table) Boleh nampak kah?

A: tidak berapa nampak, tapi kalau ada suara boleh nampak macam bayang-bayang.

PW18 did not deny that the surrounding area was dark. However, when he heard the voice of the deceased, he walked back and hence he saw what had happened. So, it is not correct for counsel to conclude that PW18's evidence is not reliable because of the darkness in the surrounding area. The accused had already testified that he could clearly see when he went close to the scene.

(c) The accused evidence is inconsistent with the prosecution witness (PW17).
The accused testified that he went home from John's house together with PW17 and PW18 while the deceased and Joy were behind them. However, this piece of evidence is not consistent with the evidence given by PW17 and PW18. Both prosecution witnesses testified that the accused was walking behind them together with Joy. PW17's relevant testimony is as follows:

Q: sama siapa kamu pulang?

A: Santa florian.

Q: Ada yang lain?

A: Belakang kami Kilat dan Joy.

Therefore, I do not accept and believe the accused's testimony that he was not with Joy at the material time.

PROOF BEYOND REASONABLE DOUBT

[30] On the foregoing grounds, it is my finding that at the conclusion of the trial, the prosecution has proved beyond reasonable doubt the charge of murder against the accused, and so in accordance with s 182A(2) of the Criminal Procedure Code, I find the accused guilty of the offence as charged and record a conviction against him.

SENTENCE

[31] Parliament has in its wisdom provided for and prescribed only one mandatory sentence under s 302 of the Penal Code and it is death. I am left with no other alternative but to and do impose the sentence of death on the

accused. In accordance with s 277 of the Criminal Procedure Code and consistent with the intention of the Parliament, I direct that the accused be hanged by the neck till he is dead.

Accused convicted of murder and sentenced to death.

Reported by Ashok Kumar